Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1451

FREDERICK B. PFISTER,

Petitioner

v.

HONORABLE NEWELL EDENFIELD
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

HONORABLE ROBERT HALL
(ASSIGNED SUCCESSOR DISTRICT JUDGE)
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

and

UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA

and

DELTA AIR LINES, INC., et al,

Respondents

MOTION FOR LEAVE TO FILE PETITION, AND PETITION FOR COMMON LAW WRIT OF CERTIORARI AND WRIT OF MANDAMUS AND/OR PROHIBITION AND/OR INJUNCTION; TO DISTRICT COURT AND COURT OF APPEALS FOR FIFTH CIRCUIT.

SEPARATE APPENDIX

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United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FREDERICK B. PFISTER vs. DELTA AIR LINES., et al.	CIVIL ACTION No. C78-1567A

ORDER

This suit by a former employee of Delta Air Lines, Inc. (Delta) charges twenty-six defendants[1] with violations of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, *et seq.* Originally filed in the United States District Court for the District of Columbia, the case was transferred to this district pursuant to 28 U.S.C.

[1] Plaintiff has named as defendants: Delta, the Delta Employee Benefit Plan (the Plan), consisting of Delta Family Care, Disability and Survivorship Plan, Delta Air Lines, Inc. Group Insurance Plan, and Delta Family-Care Retirement Plan; the Delta Administrative Committee acting on behalf of Delta Family Care, Disability and Survivorship Plan, and Delta Family-Care Retirement Plan; Delta Administrative Committee members W.T. Beebe, D.C. Garrett, Jr., R. Oppenlander, J.R. Howell, H.T. Fincher, R.W. Allen, R.S. Maurer, T.M. Miller, Wm. E. Stephens, each in their individual capacities; the Plan Administrator of Delta Family Care, Disability and Survivorship Plan, Delta Family-Care Retirement Plan, and Delta Employee Benefit Plan, individually; John Aduddell; J.J. Schneider; and Donald Baus (all of the above hereinafter collectively referred to as Delta defendants); Charles T. Bishop, Jr.; and the Brewer Adjustment Company.

§ 1404(a) on September 15, 1978.[2] It is now before the court on twenty-four defendants'[3] motion to strike and/or dismiss, request for costs and attorneys' fees, and request for an oral hearing. Rules 12(b)(6), 12(f), and 54(d), Fed.R.Civ.P.

Plaintiff contends that in 1973, while employed as a mechanic by Delta at its facilities at Washington National Airport in the state of Virginia and while a participant in the Delta employee disability, medical, and retirement benefit plan ("Plan"), he injured his back. On March 30, 1974, he allegedly reinjured his back but continued to work for Delta through June 30, 1974. Plaintiff charges that Delta had promised to provide him with "light work" following his injury in March, that it reneged on this promise and required heavy lifting, and that as a result he became totally disabled on June 30, 1974 and has continued so to the present. He further alleges that prior to his departure from Delta due to his disability, Delta, acting in concert with the Plan, sought to force plaintiff to quit his employment so that he would forfeit all Plan benefits. Plaintiff was certified as totally disabled by his physician on November 8, 1974, and, at some point, the Plan and Delta apparently acknowledged in a letter written by defendant Stephens that plaintiff was disabled and was entitled to total disability status through February 28, 1975. Plaintiff contends that defendants induced him to meet with defendant Bishop, an insurance adjuster, without benefit of counsel, by telling him they had already determined that he was totally disabled and wold receive all of his benefits. During that meeting plaintiff made a statement which has been interpreted by defendants as damaging to his disability claim. Following this interview, plaintiff alleges that the adjuster visited his physician. As a result, without any additional medical examination, his doctor revised his diagnosis and declared plaintiff eligible for "light duty work", and on March 1, 1975, the Plan

[2] The district court granted defendants' motion to transfer on March 31, 1977, but because plaintiff attempted a variety of appeals from that order, the case was not transferred to this district for a year and a half.

[3] All of the defendants except Brewer Adjustment Company and Charles T. Bishop, Jr. have joined in this motion.

arbitrarily rescinded his status of permanent disability and cancelled all employee benefits without an explanation for their conduct and without affording plaintiff an opportunity to be heard.[4] Plaintiff further asserts that he attempted to obtain copies of the benefit plans and other pertinent information from defendants but that defendants refused to provide him with the same until after this suit was filed and that he therefore was unable to convert his insurance or to appeal the decision regarding his disability. In an eight-count complaint, he now seeks disability and retirement benefits, cumulative damages and penalties in excess of $48,000,000, and a permanent injunction against the defendants.

Defendants have moved to strike or dismiss certain of plaintiff's prayers for relief in Count I, certain statements included in plaintiff's allegations in Count I, plaintiff's claims in Counts II through VIII for compensatory and punitive damages, and plaintiff's request for a trial by jury. Plaintiff has opposed this motion,[5] and, as noted earlier, both sides have requested oral argument of this matter. The court declines to hear oral argument on these issues, noting for the benefit of plaintiff's counsel, who strenuously asserted his right to such argument, that Rule 78, Fed.R.Civ.P., states: "To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing

[4] There is some indication in plaintiff's brief that he was unaware of the reasons for the termination of his benefits until approximately July 16, 1975 when defendant Stephens, in a letter responding to an inquiry by plaintiff's congressman, Herbert C. Harris, II, stated that plaintiff had been denied long-term disability benefits because his doctor had certified that the plaintiff was able to perform "light work" on March 1, 1975.

[5] The court notes that plaintiff's counsel is from Los Angeles, California and does not maintain an office in this district. Although he has not sought leave to appear *pro hac vice*, Local rule 71.4, the court will grant him permission to so appear. Counsel is cautioned to familiarize himself with the local rules of this court, however.

upon brief written statements of reasons in support and opposition." The Local Rules of this court include such a provision,[6] and the court sees no need to deviate from its practice in this case.

Count I of the complaint alleges deprivation of benefits to which plaintiff was entitled pursuant to the Plan and seeks recovery of those benefits or a lump sum payment of $500,000. This claim is based upon 29 U.S.C. § 1132(a)(1)(B), which authorizes a plan participant to bring a civil action "to recover benefits due him under the terms of his plan ...." Both parties apparently agree that under the Plan plaintiff's right to continued benefits after March 1, 1975 depended upon either his continued employment with Delta after that date or the continuation of his totally and permanently disabled status. Defendants now seek dismissal of the prayer for benefits on the ground that plaintiff was not in Delta's employ on the critical date—a fact which he does not dispute—and that he was not then and is not now permanently disabled. Defendants' latter assertion seemingly derives from plaintiff's allegation that although defendants determined, "without further medical examination, that Plaintiff could perform 'light work', [they have] failed to proffer any work of any type whatsoever to Plaintiff up to the present," Complaint, Count I, ¶ 21, and that this failure to provide such work demonstrates defendants' intent to deprive plaintiff of his benefits. Complaint, Count I, ¶ 34. They argue that since plaintiff "seeks" light work he cannot have been or now be totally disabled and therefore, as a matter of law, is not entitled to benefits under the Plan.

The court declines to read plaintiff's allegation in this fashion, particularly in light of other charges contained in the complaint. Paragraph 14 of Count I alleges that "as a result of Plaintiff's conscientious efforts to carry out his duties as a Delta mechanic, his injuries were substantially aggravated, rendering

[6] Local Rule 91.3 provides, "All motions shall be decided by the Court without oral hearing unless otherwise ordered by the Court."

him totally and permanently disabled." Nowhere does plaintiff state that he is no longer totally disabled, and the court cannot infer this fact from the allegations relating to light work. A motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41 (1957). Since plaintiff may be able to prove at trial his complete disability, and thus his entitlement to benefits, the court DENIES defendants' motion on this point.[7]

Defendants have also moved to dismiss plaintiff's prayer for injunctive relief in Count I insofar as it seeks to enjoin them from future discrimination against other Plan participants. They note that this suit is not brought on behalf of a class and therefore that such relief is without basis. As plaintiff has offered no opposition on this point, the court hereby DISMISSES this prayer for injunctive relief.

Defendants next argue that plaintiff's claim against the plan administrator for civil penalties of $100 per day should be dismissed. This claim is based upon 29 U.S.C. § 1132(c), which states:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be

[7] In opposition to defendants' motion, plaintiff has also argued that he is entitled to benefits because Delta was under an obligation to provide him with "light work" and that if it had fulfilled its duty in this regard he would still be a Delta employee and would be covered by the Plan. The court finds no support under ERISA or any other law for such a position.

> personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal and the court may in its discretion order such other relief as it deems proper.

Under 29 U.S.C. § 1024(b)(4), the administrator, upon written request of any participant or beneficiary, is required to furnish "a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." Plaintiff alleges that he requested in writing from the plan administrator but did not receive "the Plan text, the appeal procedures, and general information concerning his rights as a Plan participant."[8] Complaint, Count I, ¶ 12.

Defendants seek dismissal of this claim, noting that the requirement in section 1024(b)(4) that administrators supply a copy of the latest summary plan description and plan description to participants upon request was not in effect at the time of the alleged violation, having been suspended by Department of Labor regulations until May 30, 1976, and then again until July 15, 1977.[9] They argue therefore that plaintiff's claim for $100 a day penalties is inappropriate as a matter of law.

Plaintiff counters that although the Secretary of Labor deferred the requirement pertaining to production of certain documents a similar provision contained in ERISA's predecessor statute, the Welfare and Pension Plans Disclosure Act, authorized penalties of $50 per day for an administrator's failure to provide certain documents to a plan participant. His argument continues that by virtue of 29 U.S.C. § 1032 this prior penalty provision is still in force. Section 1032(a)(1) provides, "The Welfare and Pension Plans Disclosure Act is repealed except that such Act shall continue to apply to any conduct and

[8] It appears that plaintiff did receive these materials on or about December 16, 1976, after the filing of this suit.

[9] 29 C.F.R. §§ 2520.104-2, -4 (1977).

events which occurred before the effective date of this part." Plaintiff interprets this section to mean that no provision of the old Act was deemed repealed until its replacement section had become effective. Therefore, although the effective date of section 1024(b)(4) was postponed, the former $50 per day penalty provision necessarily governed the administrator's conduct.

The court cannot resolve the propriety of this penalty claim at this juncture for two reasons. First, it is unclear precisely which documents plaintiff requested in writing from defendant administrator. Plaintiff's allegation on this point is not specific, and it is possible, although unlikely, that he requested copies of documents other than the plan description and summary plan description. If he sought other documents required by section 1024 to be furnished to plan participants, the deferral regulation would have no impact since it excused production of the summary plan descriptions and plan descriptions only; the administrator would still be liable for failure to supply the other covered material. *See Pollock v. Castrovinci, et al.*, No. 78-2071 (S.D.N.Y., Aug. 14, 1978) order denying summary judgment; *see generally Hastings v. Merrill Lynch, Pierce, Fenner & Smith, et al.*, No. 7-70025 (E.D. Mich., Dec. 22, 1977) (order granting in part and denying in part summary judgment).

The second reason that the court cannot conclude this controversy is that neither side has provided it with sufficient information to determine the applicability of the deferral provision. The Secretary's regulation postponed the effective date of certain portions of section 1024(b)(4) only for welfare and pension plans which became subject to part 1 of ERISA prior to January 31, 1976. Thus, this regulation may not have applied to Delta at all.[10] For all of the foregoing reasons,

[10] Twenty-nine U.S.C. § 1031(b)(2) and any regulations pursuant thereto may also have some bearing on this case.

defendants' motion to dismiss the claim for a $100 per day penalty is DENIED.[11]

Defendants have also moved to strike certain allegations contained in Count I of the complaint pursuant to Rule 12(f), Fed.R.Civ.P. That rule authorizes the court to "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike, however, are not favored and material will not be stricken unless it is clear that it can have no possible bearing upon the subject matter of the litigation. 2A *Moore's Federal Practice,* ¶ 13.21[2], at 2429 (2d ed. 1975). The court has carefully reviewed the allegations in question, and while they appear to be irrelevant, it is unlikely that defendants will be prejudiced by their presence. Accordingly, the motion is DENIED on this point.

In Counts II through VIII of the complaint, plaintiff requests compensatory and punitive damages totaling $48,000,000. Noting that plaintiff has based his complaint solely upon violations of ERISA, defendants now seek dismissal of these counts on the ground that ERISA's general remedial scheme does not support a claim for such damages. They argue that the language of the civil enforcement provision, 29 U.S.C. § 1132, and the statute's legislative history evidence a clear intent to preclude damages of this sort. In addition, they point

[11] Defendants also requested that the court exercise its discretion and dismiss plaintiff's claim because plaintiff has now received the material and has not shown that he was harmed by the delay and because if the administrator failed to respond to plaintiff's demand the failure stemmed from matters reasonable beyond his control and thus was permitted by section 1024(b)(4). To exercise the court's discretion on these grounds at this stage of the proceedings would be premature. It is not clear that plaintiff need show harm during the delay, and certainly, he would not be required to present such factual issues in response to a motion to dismiss. Further, whether the administrator's failure was due to "matters reasonable beyond his control" is a question of fact to be developed at trial.

out that punitive and compensatory relief has not customarily been awarded under analogous statutes. For the reasons set forth below, the court concludes that defendants are correct.

Section 1132 provides that a civil action may be brought

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Nowhere in this section does the word "damage" appear. Instead, each subsection either identifies the precise form of relief available to a plaintiff under that provision, *e.g.*, recovery

of benefits, ties the relief authorized to a specific provision of ERISA, *e.g.*, a penalty for filing or document deficiencies or recovery of profits in the event of a breach of fiduciary duty, or refers to "other appropriate equitable relief." Plaintiff's suit must necessarily be based upon subsections (a)(1) and (3). The latter provision by its own terms permits only equitable relief and thus does not encompass compensatory or punitive damages; the former, while describing a monetary recovery, leaves no suggestion that anything other than the amount due to a participant under the terms of the plan will accorded to him.

That Congress did not intend to authorize awards of additional monetary relief is made clear by a review of portions of the voluminous legislative history of this Act. ERISA was enacted to establish safeguards and standards which would protect and support the pension and benefit expectations of employees so that workers who had been employed for years would not discover upon retirement that the pension benefits upon which they planned to live were not forthcoming. Its purpose was not to punish pension fiduciaries, administrators, or employers but to insure the delivery of earned benefits. Since the pension and employee plan benefit system is a voluntary one in that employers may decline to provide such benefits, Congress was concerned that in legislating to protect employee rights under these programs, it not burden employers with additional costs and requirements so that they discontinued these plans. The House Committee on Education and Labor stated:

> The Employee Benefit Security Act as reported by the Committee is designed to remedy certain defects in the private retirement system which limit the effectiveness of the system in providing retirement income security. The primary purpose of the bill is the protection of individual pension rights, but the Committee has been constrained to recognize the voluntary nature of private retirement plans.

> The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analyzed on the basis of their projected costs in relation to the anticipated benefit to the employee participant.

H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News, 4639. Senator Nelson expanded upon this notion during the floor debate on the Conference Report:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

Legislative History of the Employee Retirement Income Security Act of 1974, 4800 (3 volumes, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, April, 1976). This concern over increased costs and the harmful effect they might have on the continuation of existing plans and the instigation of new ones explains the careful choice of language in section 1132, in specifically providing for injunctive relief and the recovery of benefits and certain penalties and thus precluding compensatory and punitive damages.

Plaintiff has pointed to nothing in the legislative history which undercuts this conclusion. The statement in the Senate report to the effect that the Act is intended to provide "legal and equitable remedies," S.Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Cong. Code & Admin. News 4871, does not demonstrate, as plaintiff urges, the propriety of general and punitive damages. Instead, it suggests that the committee considered the recovery of benefits or the clarification of rights as legal remedies. Plaintiff's contention that punitive damages are essential to deter breaches of fiduciary duty and to guarantee proper management of the funds is also devoid of merit. ERISA includes a strong deterrent to such conduct in the form of criminal sanctions. Twenty-nine U.S.C. § 1131 provides:

> Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

Finally, the court concludes that its holding that neither punitive nor compensatory damages is available under ERISA is consistent with judicial interpretation of analogous statutes. Such relief has generally been denied under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), the Equal Pay Act, 29 U.S.C. § 206(d), *Kumbalek v. I. Bahcall Industries, Inc.*, 6 FEP Cas. 1269 (E.D. Wis. 1974), and the National Labor Relations Act, 29 U.S.C. §§150, *et seq., International Union, UAA & AIW v. Russell*, 356 U.S. 634 (1958). Plaintiff's citations to cases brought pursuant to the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-412, in which

punitive and compensatory damages have been awarded are inapposite since section 412, the remedial provision, authorizes suits to obtain "such relief (including injunctions) as may be appropriate" and thus clearly permits awards of damages. Plaintiff's attempted analogy to certain provisions of the Labor Management Relations Act, 29 U.S.C. §§ 141, *et seq.*, meets a similar fate. The remedial language of both sections 185 ("money judgment") and 187 ("damages") differs significantly from that contained in ERISA's enforcement provision. Accordingly, this court concludes that neither compensatory nor punitive damages are available in actions brought pursuant to ERISA. *See Hurn v. Retirement Fund Trust*, 424 F.Supp. 80 (C.D. Cal. 1976); *Bell v. Southern Log Scaling & Grading Bureau*, No. 76-431 (D. Ore., Aug. 5, 1976).

While this result requires the court to dismiss Counts II, III and IV, plaintiff contends that Counts V through VIII are still properly before the court. According to plaintiff, these counts set forth causes of action for fraud, misrepresentation and deceit, intentional and negligent infliction of emotional distress, breach of duty to deal in good faith, and tortious interference with the fiduciary relationship. Plaintiff's Supplemental Opposition, at 28. His principal argument for the vitality of these counts appears to be that under ERISA these torts must be recognized as a part of the federal common law. The court declines this invitation to so extend the law, however. Noting that plaintiff has not alleged the existence of pendant jurisdiction for these claims or identified the state law on which they might be based, defendants have moved to dismiss these four counts on the grounds that the court should not exercise its pendant jurisdiction over these claims or, alternatively, that ERISA preempts all state tort claims relating to pension and welfare benefits. Since plaintiff has not seriously considered these issues in his briefs, the court will DEFER decision on the dismissal of Counts V through VIII and GRANT plaintiff an additional twenty (20) days in which to submit a supplemental brief on these topics. Defendants may then submit a reply brief within twenty (20) days of receipt of plaintiff's memorandum.

The last major question to be resolved is whether or not plaintiff's demand for a trial by jury should be stricken. Defendants argue that plaintiff's suit seeks only equitable relief and thus that a jury trial would be inappropriate. They claim that just as "back pay" has been held to be restitution and thus equitable relief in Title VII actions so that jury trials have not been required, *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975), plaintiff's claim for benefits—which appears to be the critical claim in this lawsuit—must be considered equitable. The court disagrees.

While it is true that a monetary remedy need not necessarily be a legal remedy, whether it is to be considered legal or equitable is determined by interpretation of the remedial statute as a whole. Any pertinent legislative history will, of course, assist in this determination.

In Title VII, to which defendants analogize, the remedial provision, 42 U.S.C. § 2000e-5(g), states:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief* as the court deems appropriate.

(Emphasis added.) Thus it is clear that back pay, in this context, is "other equitable relief", and a trial by the court sitting without a jury is therefore proper.

The remedial provision of the Age Discrimination in Employment Act, on the other hand, states that its provisions shall be enforced in accordance with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, and that "amounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation" under the FLSA. 29 U.S.C. § 626(b). A court

is also authorized to give "such legal or equitable relief as may be appropriate." *Id.* Relying upon the stated connection between the FLSA, which permitted jury trials, and the ADEA and the reference to *legal* relief, the Supreme court concluded that under the ADEA a jury trial was required upon timely demand. *Lorillard v. Pons*, 434 U.S. 575 (1978).

The provision at issue in the instant action falls between these two extremes and presents a much closer question. As noted earlier, it states in part:[12]

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the term of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary—
>
> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

The structure of this section was considered in *Stamps v. Michigan Teamsters Joint Council No. 43*, 431 F.Supp. 745, 747 (E.D. Mich. 1977):

> The section sets forth, in the alternative, two remedies which are available to the beneficiary. Subsection (a)(3) clearly and specifically creates a civil action for equitable

[12] *See* text at pp. 8-9, *supra*, for entire statute.

> relief. Subsection (a)(1)(B) creates a different civil action for legal relief. This follows the general rule of statutory construction that statutes should be construed in such a way as to render none of the subsections superfluous. If the court construed subsection (a)(1)(B) to also create a cause of action for equitable relief, it would be superfluous to subsection (a)(3).

This court now concludes that the *Stamps* approach presents the proper construction of this statute.

That the monetary benefits envisioned by subsection (a)(1)(B) are to be considered legal relief is supported by at least two portions of ERISA's legislative history. First, the Joint Conference Report states that actions pursuant to this section "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Cong. Code & Admin. News, 5038, 5107. Suits of that nature are customarily tried to a jury. *Steele v. Brewery Workers Local 116,* 432 F.Supp. 369 (N.D. Ind. 1977). Second, as mentioned earlier, the Senate report referred to "legal and equitable remedies" available under ERISA. This reference to "legal" must have been made with the recovery of monetary benefits in mind. Accordingly, the court concludes that plaintiff has stated a claim for legal relief and is therefore entitled to a jury trial. Defendants' motion to the contrary is DENIED.

Finally, the court DENIES defendants' request for costs and attorneys' fees in connection with this motion.

In sum, defendants' motion to dismiss or to strike is GRANTED in part and DENIED in part, their request for costs and attorneys' fees is DENIED, and the request for oral argument is also DENIED. Plaintiff is DIRECTED to submit a supplemental brief within twenty (20) days and defendants are

DIRECTED to file their response, if any, within twenty (20) days of receipt of plaintiff's brief. The clerk is DIRECTED to resubmit this case in forty (40) days.

So ORDERED, this 20th day of December, 1978.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

APPENDIX B

In The United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

FREDERICK B. PFISTER, *Plaintiff,* vs. DELTA AIR LINES, INC., CHARLES T. BISHOP, JR., BREWER ADJUSTMENT COMPANY, et al., *Defendants.*	CIVIL ACTION No. C78-1567A

ORDER

The within and foregoing Motion of Gorman and Canfield and Austin F. Canfield, Jr. as present attorneys of record for defendant Brewer Adjustment Company, the sole proprietorship of Joseph H. Brewer, now deceased, and defendant Charles T. Bishop, Jr. having been read and considered and it appearing to the Court that due notice of said request of such attorneys and of this Motion having been given to defendant Charles T. Bishop, Jr. and Mrs. Dorothy Bishop Brewer, the Executrix and personal representative of Joseph H. Brewer, deceased, and their being no objection to such Request and Motion,

IT IS HEREBY ORDERED and adjudged that the firm of Gorman and Canfiled, and Austin F. Canfield, Jr. be and hereby are withdrawn as attorneys of record for defendants Charles T. Bishop, Jr. and Brewer Adjustment Company and

Joseph H. Brewer, deceased, and his personal representative, Mrs. Dorothy Bishop Brewer, and, as moved, that the law firm of Hansell, Post, Brandon & Dorsey and its partners and associates are hereby acknowledged as attorneys of record for said defendants and the clerk of this Court is directed to make such changes on the docket and other papers to evidence such substitutions of attorneys.

This 26th day of December, 1978.

NEWELL EDENFIELD

Judge, U.S. District Court
Northern District of Georgia
Atlanta Division

APPENDIX C

EXHIBIT B

United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FREDERICK B. PFISTER vs DELTA AIR LINES, INC., et al	CIVIL ACTION No. C78-1567A

ORDER TO FORWARD COPIES

It appearing to the Court that a notice of appeal has been filed by Frederick B. Pfister, plaintiff from the order of December 21, 1978, and it further appearing that this case is still pending.

IT IS ORDERED that the Clerk forward copies of the pleadings to the United States Court of Appeal in lieu of the originals.

This 16th day of February, 1979.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

APPENDIX D

United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

FREDERICK B. PFISTER, *Plaintiff,* vs. DELTA AIR LINES, INC., et al. *Defendants.*	CIVIL ACTION No. C78-1567A

ORDER

The foregoing Motion of the Plaintiff, FREDERICK B. PFISTER, requesting substitution of MRS. DOROTHY BISHOP BREWER, the Executrix of the Estate of JOSEPH H. BREWER, now deceased, sole owner and proprietor of named Defendant BREWER ADJUSTMENT COMPANY and providing for the continuance of the within action against said substituted Executrix as a personal representative of aforesaid deceased, JOSEPH H. BREWER, sole owner and proprietor of BREWER ADJUSTMENT COMPANY, having been duly read and considered and proper notice afforded all parties of record in the within proceeding,

IT IS HEREBY ORDERED AND ADJUDGED that the Motion of the Plaintiff, FREDERICK B. PFISTER, substituting MRS. DOROTHY BISHOP BREWER, the Executrix of the Estate of JOSEPH H. BREWER, the sole owner and proprietor of BREWER ADJUSTMENT COMPANY, the named Defendant herein, be forthwith granted and entered by the Clerk of this Court.

IT IS FURTHER ORDERED hereby that the within action be further continued and prosecuted against BREWER ADJUSTMENT COMPANY by and in the name of the aforesaid Executrix MRS. DOROTHY BISHOP BREWER; and that all processes duly invoked by this Court shall bind and otherwise obligate her as the Executrix of the Estate of JOSEPH H. BREWER, sole owner of BREWER ADJUSTMENT COMPANY, and

IT IS FURTHER ORDERED that the estate of JOSEPH HUGH BREWER, Decedent, identified as Estate No. 106-196 in the Probate Court in and for the County of Fulton, State of Georgia, remain open; and said Probate proceedings stayed until the claim of the Plaintiff against said Estate of JOSEPH H. BREWER as embodied in the Complaint herein as finally and properly discharged to the satisfaction of the Plaintiff.

SO ORDERED this 27th day of June, 1979.

NEWELL EDENFIELD

Judge, U.S. District Court
Northern District of Georgia
Atlanta Division

APPENDIX E

United States District Court

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

FREDERICK B. PFISTER	CIVIL ACTION
vs.	
DELTA AIR LINES, INC. et al.	No. C78-1567A

ORDER

This is a civil action involving alleged violations of the Employment Retirement Income Security Act of 1974 (ERISA), 29 29 U.S.C. §§ 1001, *et seq.*, by twenty-six defendants.[1] It is now before the court pursuant to the court's order of December 20, 1978 and plaintiff's request for reconsideration of that order. A brief review of the facts is appropriate.

[1] Plaintiff has named as defendants: Delta, the Delta Employee Benefit Plan, consisting of Delta Family Care, Disability and Survivorship Plan, Delta Air Lines, Inc. Group Insurance Plan, and Delta Family-Care Retirement Plan; the Delta Administrative Committee acting on behalf of Delta Family Care, Disability and Survivorship Plan, and Delta Family-Care Retirement Plan; Delta Administrative Committee members W.T. Beebe, D.C. Garrett, Jr., R. Oppenlander, J.R. Howell, H.T. Fincher, R.W. Allen, R.S. Maurer, T.M. Miller, Wm. E. Stephens, each in their individual capacities; the Plan Administrator of Delta Family Care, Disability and Survivorship Plan, Delta Family-Care Retirement Plan, and Delta Employee Benefit Plan, individually; John Aduddell; J.J. Schneider; and Donald Baus (all of the above hereinafter collectively referred to as "Delta defendants"); Charles T. Bishop, Jr.; and the Brewer Adjustment Company.

Plaintiff asserts that in 1973, while employed as a mechanic by Delta at its Washington National Airport facilities and while a participant in the Delta employee disability, medical, and retirement benefit plan ("Plan"), he injured his back. He further contends that he reinjured his back on March 30, 1974 but that despite this injury he continued to work for Delta through June 30, 1974. Plaintiff states that following his second injury Delta promised to provide him with "light work" in the future. Contrary to this agreement, however, Delta allegedly continued to assign plaintiff to tasks requiring heavy lifting, which resulted in his total disability from June 30, 1974 to the present. Plaintiff further charges that during the March-June 1974 period, Delta, acting in concert with the Plan, sought to force plaintiff to quit his employment so that he would forfeit all plan benefits. In addition, certain of the defendants are said to have induced plaintiff to meet with defendant Bishop, an insurance adjuster employed by defendant Brewer Adjustment Company, in the absence of counsel, by telling him he had already been determined to be totally disabled[2] and would receive all his benefits under the Plan. Plaintiff contends that he made a statement during this interview which defendants have interpreted as being damaging to his disability claim and that as a result of this comment defendant Bishop met with plaintiff's physician and prevailed upon him to revise his diagnosis and declate plaintiff eligible for light duty work. On March 1, 1975, the Plan allegedly rescinded plaintiff's permanent disability status and canceled all his emplyee benefits without providing any reasons for such action and without affording plaintiff an opportunity to be heard. Plaintiff also asserts that after this arbitrary action, he attempted to obtain copies of the benefit plans and other pertinent information but

[2] On November 8, 1974, a physican certified plaintiff as totally disabled, and sometime thereafter, Delta and the Plan appear to have acknowledged his disability and granted him disability status through February 28, 1975.

that defendants refused to provide him with the same until after this suit was filed, thus preventing him from either converting his insurance or appealing the decision regarding his disability.

Claiming that he was inappropriately denied Plan benefits and that he has suffered great physical and emotional harm because of defendants' activities, plaintiff filed the instant action seeking disability and retirement benefits, compensatory and punitive damages in excess of $48,000,000, injunctive relief, a $100 per day penalty for failure to provide him with Plan information, and attorneys' fees.[3] By order dated December 20, 1978, in response to a motion submitted by all but two of defendants,[4] the court dismissed various aspects of plaintiff's eight-count complaint. Counts II through IV, which sought compensatory and punitive damages from defendants, were dismissed when the court determined that ERISA's general remedial scheme does not support claims for such relief. In addition, the court dismissed the prayer for injunctive relief set forth in Count I to the extent that it sought to enjoin defendants from future discrimination against Plan participants other than plaintiff on the ground that this suit had not been brought on behalf of a class.[5] Noting that plaintiff had not considered defendants' preemption or pendent jurisdiction arguments in support of their motion to dismiss Counts V through VIII, which allegedly set forth state law tort claims for compensatory and punitive damages, however, the court deferred a decision on this portion of the motion. Plaintiff was granted an additional period of time within which to submit a supplemental brief on the issues raised by defendants, and defendants

[3] This action was originally filed in the United States District Court for the District of Columbia and was transferred to this district pursuant to 28 U.S.C. § 1404(a) on September 15, 1978.

[4] Defendants Brewer Adjustment Company and Charles T. Bishop, Jr. did not join in this motion.

[5] Plaintiff suggests that the court actually dismissed his entire request for injunctive relief. This is clearly an incorrect interpretation of the decision. *See* Order of December 18, 1978, at 5.

were permitted an additional period of time in which to file a reply brief. Plaintiff has now submitted to the court two documents, styled "Plaintiff's Motion for Reconsideration" and "Memorandum of Points and Authorities in Support of Country Ordered Reconsideration," which apparently include whatever reply he proposes to make to defendants' contentions regarding the tort counts, and defendants have responded.

Plaintiff's motion for reconsideration focuses primarily upon the court's determination that compensatory and punitive damages are not available as remedies for violations of ERISA and its consequent dismissal of Counts II through IV.[6] Although plaintiff has presented no new arguments or authority in support of his position that such damages were intended under the statute, the court has carefully reviewed the question and concludes that its earlier decision was correct. Compensatory and punitive damages are not authorized under the precise and detailed statutory language of ERISA, and, given this statutory structure, the court sees no basis for constructing a new set of remedies. It therefore declines to alter its order and DENIES plaintiff's motion for reconsideration.

The court must next consider that portion of defendants' motion—which had previously been deferred—requesting that Counts V through VIII of the complaint be dismissed. These counts seek compensatory and punitive damages for torts allegedly committed by defendants in the course of denying plaintiff his employee benefits. According to plaintiff, they set forth causes of action for the intentional and negligent infliction of emotional distress (Count V), fraud, misrepresentation, and deceit (Count VI), tortious interference with the attorney-client relationship (Count VII), and breach of the fiduciary duty to deal in good faith (Count VIII). Defendants contend that

[6] Plaintiff also takes issue with certain portions of the statement of facts contained in the December order. Since the facts in question had no bearing on the substantive rulings in that order, the court need not resolve these objections.

these counts are subject to dismissal because plaintiff's complaint specifically states that his claims arise only under ERISA and such claims are not cognizable under that statute, because ERISA preempts all state tort claims, and because even if such claims are not preempted, the court should not exercise its pendent jurisdiction over these counts.

Paragraph 1 of Count I of the complaint sets forth the specific legal bases for this lawsuit, and this paragraph is incorporated into all other counts of that document. Since this paragraph refers only to ERISA, and presents no other ground for relief, defendants assert that these counts seeking compensatory and punitive damages should be dismissed as were Counts II through IV.

Although defendants' statement of the jurisdictional bases asserted in the original complaint is correct, plaintiff's response reveals his belief that he has invoked the court's pendent jurisdiction to assert state tort claims.[7] He notes that his "Answer to Defendants' Motion to Dismiss" filed in February, 1977, refers to the court's pendent jurisdiction over these counts, and, in addition, he relies upon a "Supplemental Complaint" from November, 1978 which he indicates corrected the oversight in the earlier complaint. While the official file and docket do not reflect the filing of such a supplemental complaint, the court concludes that since plaintiff has evidenced his intent to invoke the court's pendent jurisdiction and can easily remedy his failure to do so in his complaint, dismissal of Counts V through VIII on this technical point would be inappropriate.

[7] The court initially understood—perhaps incorrectly—plaintiff to be arguing that the torts alledged in these counts must be recognized as part of the federal common law under ERISA. It declined to so extend the law, however. *See* Order of December 18, 1978, at 13.

Defendants next contend that these tort counts must fail because ERISA preempts state tort claims of this nature. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

State laws are defined as "all laws, decisions, rules, regulations or other state action having the effect of law," 29 U.S.C. § 1144(c), as indicated, subsection (b) of this statute carves a narrow area in which state laws may continue to operate. Those state laws not preempted are ones "regulating insurance, banking, or securities" and "any generally applicable criminal laws." No specific exception for tort laws of general application was included.

Section 514(a) was clearly intended to have broad preemptive effect, *see Wadsworth v. Whaland,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978); *National Carriers' Conference Committee v. Heffernan,* 454 F.Supp. 914 (D. Conn. 1978); *Hewlett Packard Co. v. Barnes,* 425 F.Supp. 1294 (N.D. Cal. 1977), *aff'd* 571 F.2d 502 (9th Cir.), *cert. denied,* 47 U.S.L.W. 3222 (U.S., October 2, 1978)(detailed reviews of the provision's legislative history), and it appears, given the connection between the allegedly tortious activities, the fiduciary obligation, and the Plan, that this provision would encompass the claims in issue here. *Hurn v. Retirement Fund Trust,* 424 F.Supp. 80 (C.D. Cal. 1976); *see Francis v. United Technologies Corp.,* 458 F.Supp. 84 (N.D. Cal. 1978). *But see American Telephone & Telegraph Co. v. Merry,* 592 F.2d 118 (2d Cir. 1979); *STONE v. STONE,* 450 F.Supp. 919 (N.D. Cal. 1978), appeal pending, No. 78-2313 (9th Cir.). The court need not resolve this question at this juncture, however, since

even assuming that plaintiff could assert a nonpreempted claim in tort, the court would decline to exercise its pendent jurisdiction to hear it.

In *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), the Supreme Court discussed various factors to be taken into consideration before a federal court exercises its pendent jurisdiction over a state law claim. It stated:

> That power [of pendant jurisdiction] need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. at 726. (Citations and footnotes omitted.) The Court also noted that the substantial predomination of state issues, "whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought" and the likelihood of jury confusion in treating divergent legal theories of relief should weigh heavily in leaving the resolution of state claims to state tribunals. *Id.* at 726-27.

Consideration of these factors in the case at bar leads to the conclusion that this is not a proper case for the exercise of pendent jurisdiction. The trial of a state cause of action in tort for recovery of compensatory and punitive damages in the same proceeding as an action under ERISA to recover lost benefits would result in further complication of an already difficult and complex lawsuit. Moreover, it appears that in connection with his state tort claims, plaintiff will need to offer evidence of incidents or facts which have no bearing on the benefits

question. Thus, if the state tort claims are tried with the federal claims, the likelihood of jury[8] confusion "in treating divergent legal theories of relief" is substantial. This is particularly true since the court has dismissed plaintiff's requests for compensatory and punitive damages under ERISA while plaintiff will be able to litigate the question of such damages on his state claims. Finally, on the basis of the relief requested, it appears that the state tort issues substantially predominate plaintiff's complaint. Plaintiff's ERISA claims seek $500,000 in benefits and a penalty of $100 per day for failure to provide him with Plan information. The total relief sought in Counts V through VIII pursuant to his state causes of action amounts to $25,000,000. Accordingly, on the basis of these factors, the court DECLINES to exercise its pendent jurisdiction over the state claims set forth in these counts. *See Hurn, supra; Van Hoomissen v. Xerox Corp.*, 368 F.Supp. 829 (N.D. Cal. 1973)(Title VII).

In sum, plaintiff's motion for reconsideration is DENIED and defendants' motion to dismiss Counts V through VIII is GRANTED.

So ORDERED, this 29th day of June, 1979.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

[8] In its December order, the court determined that plaintiff is entitled to a jury trial on his ERISA claim.

APPENDIX F

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-1763

FREDERICK B. PFISTER,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before CLARK, GEE and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is granted.

APPENDIX G

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-1763

FREDERICK B. PFISTER,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

O R D E R:

IT IS ORDERED that appellant's application to recall and stay mandate and for extension of time in which to file a petition for rehearing en banc of this Court's dismissal order of July 3, 1979, is granted. Such petition shall be filed within twenty days of the filing of this order.

United States Circuit Judge

APPENDIX H

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 1, 1979

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, LA. 70130

TO ALL PARTIES LISTED BELOW:
NO. 79-1763 — FREDERICK B. PFISTER v.
DELTA AIR LINES, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court to polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By SALLY HAYWARD
Deputy Clerk

cc: Mr. Eugene J. Carella
Mr. Peter G. Nash
Messrs. David C. Garrett, III
Eugene G. Partain
Mr. Hugh E. Wright

APPENDIX I

In The United States Court Of Appeals

FOR THE FIFTH CIRCUIT

Nos. 79-1763 & 79-3207

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for stay of mandate in case No. 79-1763, and to consolidate that cause with No. 79-3207 is DENIED.

IT IS FURTHER ORDERED that appellee's motion to dismiss the appeal in case No. 79-3207 is GRANTED.

IT IS FURTHER ORDERED that appellee's motion to hold plaintiff's counsel personally responsible for costs, including attorney's fees of the appeal taken in case No. 79-3207 is REMANDED to the trial court for consideration there.

APPENDIX J

In The United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 79-1763 and 79-3207

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appelant's motion for LEAVE TO FILE amended complaint and pleading in this court is DENIED.

IT IS FURTHER ORDERED that appellant's motion to disqualify lead counsel for the defendants-appellees is DENIED.

IT IS FURTHER ORDERED that appellant's motion for stay of all further proceedings in both the district court and this court until the lower court acts upon the motion for disqualification, is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that appellant's opposition and cross request for sanctions and its annexed petition for rehearing and suggestions for rehearing en banc are, on the court's own initiative, stricken as containing impertinent, disrespectful and unnecessarily abusive references to the district judge and to opposing counsel and parties. Fed.R.Civ.P. 12(f), *see* Theriault v. Silber, 574 F.2d 197 (5th Cir. 1978). Should counsel desire to file papers, couched in more moderate terms, seeking the relief proposed in the stricken documents, he is granted leave to do so within ten days.

APPENDIX K

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos. 79-1763 and 79-3207

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellant's motion for this panel to stand recused and to vacate various of its prior orders is DENIED.

IT IS FURTHER ORDERED that Appellant's petition for rehearing and for other relief lodged with Chief Judge Brown having been, by the Chief Judge's instructions, referred to the panel which entered the orders of which rehearing is sought, is DENIED.

IT IS FURTHER ORDERED that counsel for Appellant, Mr. Eugene J. Carella, before seeking to practice further before this Court, obtain admission to its Bar as required by Local Rule 5. The Clerk is directed to mail to Mr. Carella the form required by Rule 46, Fed.R.App.P. and to accept no further filings by Mr. Carella until he shall have been admitted to the Bar of this Court.

APPENDIX L

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

December 18, 1979

GILBERT F. GANUCHEAU
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

Mr. Ben H. Carter, Clerk
U. S. District Court
56 Forsyth St., NW
Atlanta, GA 30303
NOS. 79-1763 & 79-3207—
FREDERICK B. PFISTER
vs.
DELTA AIR LINES, INC., et al.
(Dist. Ct. No. C78-1567A)

Dear Mr. Carter:
Enclosed is a certified copy of this Court's order of November 13, 1979 which is reissued as and for the mandate in the above cases.
The records in each case will be returned at a later date.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

BY BRENDA HAUCK
Deputy Clerk

/bh
enclosure
cc: (LETTER ONLY)
Mr. Eugene J. Carella
Mr. Peter G. Nash
Messrs. Eugene G. Partain
David C. Garrett,III
Mr. Hugh E. Wright

APPENDIX M

United States District Court

NORTHERN DISTRICT OF GEORGIA

OFFICE OF THE CLERK
Room 100, U. S. Courthouse
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

BEN H. CARTER
CLERK

IN REPLYING, GIVE NUMBER
OF CASE AND NAMES OF PARTIES

Eugene J. Carella
5455 Wilshire Blvd.
Suite 1706
Los Angeles, California 90036

RE: FREDERICK B. PFISTER
vs
DELTA AIR LINES, INC., ET AL
C78-1567A

NOTICE

Please be advised that effective December 3, 1979, the above styled action has been reassigned to the Honorable Robert H. Hall. If you have any questions, please contact Kay Bates, Courtroom Deputy Clerk for Judge Hall at (404) 221-5207.

BEN H. CARTER, CLERK

By KAY BATES
Kay Bates
Courtroom Deputy Clerk

APPENDIX N

United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FREDERICK B. PFISTER

vs.

DELTA AIRLINES, INC., et al.

CIVIL ACTION

NO. C78-1567A

ORDER

This action is currently before the court on plaintiff's motion for disqualification of the undersigned district judge. Inasmuch as this case is being transferred to Judge Robert H. Hall, who was recently appointed to this court, plaintiff's motion is DENIED AS MOOT.

SO ORDERED, this 18th day of December, 1979.

NEWELL EDENFIELD

Newell Edenfield,
United States District Judge

APPENDIX O

In The United States Court of Appeals

FOR THE FIFTH CIRCUIT

**Nos. 79-1763 &
79-3207**

FREDERICK B. PFISTER,
Plaintiff-Appellant,

versus

DELTA AIR LINES, INC., et al.,
Defendants-Appellees.

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APPENDIX P

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, c. 139, § 65, 63 Stat.99.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has

a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceedings could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

As amended December 5, 1974, Pub.L. 93—512, § 1, 88 Stat. 1609.

SEC. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; *that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest;* that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on

by means of the mails and instrumentalities of interstate commerce; *that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered;* that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, *that minimum standards be provided* assuring the equitable character of such plans and their financial soundness.

(b) *It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sancations, and ready access to the Federal courts.*

(c) It is hereby further declared to be the policy of this Act to protect iinterstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued

benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.

(d) CROSS REFERENCE—

SEC. 111. (a)(1) The Welfare and Pension Plans Disclosure Act is repealed except that such Act shall continue to apply to any conduct and events which occurred before the effective date of this part.

SEC. 404. (a)(1) Subject to sections 403 (c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such maters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d) (4) and (5)).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

SEC. 405. (a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b)(1) Except as otherwise provided in subsection (d) and in section 403(a) (1) and (2), if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

SEC. 406. (a) Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a).

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

SEC. 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial releif as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

SEC. 501. Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

SEC. 502. (a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorneys fee and costs of action to either party.

(h) A copy of the complaint in any action under this title by a participant, beneficiary, of fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of

recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975 (e)(1) of such Code.

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation, shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

SEC. 503. In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair view by the appropriate named fiduciary of the decision denying the claim.

SEC. 506. In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this title and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize, on a reimbursable or other basis, the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this title. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this title as may be found to warrant consideration for criminal prosecution under the provisions of this title or other Federal law.

SEC. 510. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is

entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 shall be applicable in the enforcement of this section.

SEC. 511. *It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act. Any person who willfully violates this section shall be fined $10,000 or imprisoned for not more than one year, or both.*

SEC. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a

plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by the title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 111 and 507(b)) or any rule or regulation issued under any such law.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

(a) The court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPENDIX T

United States Court of Appeals for the District of Columbia Circuit

No. 77-1371 September Term, 1977

In Re:

Frederick B. Pfister
Petitioner

Civil Action #76-1978

BEFORE: Fahy, Senior Circuit Judge; McGowan and Wilkey, Circuit Judges

ORDER

It is ORDERED by the Court, *sua sponte,* that the Clerk is directed to amend his records to reflect that Circuit Judge Wilkey cast his vote to deny petitioner's petition for writ of mandamus. It is

FURTHER ORDERED by the Court, *sua sponte,* that the Clerk is directed to amend his records on petitioner's petition for writ of mandamus by adding the following paragraph:

Senior Circuit Judge Fahy: Upon further consideration I am of the view that transfer of this case to the Northern District of Georgia Atlanta Division, would seriously endanger the ability of the plaintiff to carry forward there the litigation he has chosen to initiate in this jurisdiction. The inconvenience that defendants undoubtedly would bear in defending here does not appear to be of similar seriousness. For these reasons I think the order of the District Court to transfer the case was not within the sound discretion available to the Court. Accordingly I would grant the relief prayed by petitioner-plaintiff.

Per Curiam